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Defendant

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) CA No. 23-10335-PBS  
) Pages 1 - 18

BEFORE THE HONORABLE PATTI B. SARIS  
UNITED STATES DISTRICT JUDGE

United States District Court  
1 Courthouse Way  
Boston, Massachusetts 02210  
June 24, 2024, 9:27 a.m.

LEE A. MARZILLI  
OFFICIAL COURT REPORTER  
United States District Court  
1 Courthouse Way, Room 7200  
Boston, MA 02210  
leemarz@aol.com

1       A P P E A R A N C E S:

2               SCOTT MICHAEL ABELES, ESQ., Carlton Fields, P.A.,  
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      20007, for the Plaintiff.

4               JENNIFER L. GIORDANO, ESQ., Latham & Watkins LLP,  
5       555 Eleventh Street, N.W., Suite 1000, Washington, DC,  
      20004, for the Defendant.

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P R O C E E D I N G S

THE CLERK: Good morning, Judge.

THE COURT: Good morning to everybody.

THE CLERK: I'll call the case. I have both sides on.

THE COURT: Okay.

THE CLERK: The Court calls Civil Action 23-10335, Verax Biomedical Inc. v. American National Red Cross. Could counsel please identify themselves.

MR. ABELES: Scott Abeles for Verax.

MS. GIORDANO: Good morning, your Honor. Jennifer Giordano from Latham & Watkins on behalf of the American Red Cross.

THE COURT: All right, thank you. So we're here today for a narrow purpose, which is deciding whether or not to certify for interlocutory appeal. I think, if I'm remembering correctly, that I may have suggested that might be one avenue to follow when we were together last, and I'm tempted, I have to say. I think for me it was a difficult question, and I'm really -- I'll hear argument on both, but I'm tempted to do it. But I'm also interested in, if I do do it, what to do with the rest of the case. Just stay the whole thing? How far are you in discovery? You know, more that I can get a gestalt for the entire situation. So obviously we've discussed it very briefly last time, and I think, Verax, why don't you -- I read your brief.

1 MR. ABELES: Okay. Well, thank you, your Honor. The  
2 core contention in our briefs is that the principle on which  
3 the holding rested, one of the rights of an instrumentality is  
4 immunity or non-personhood under the Sherman Act, is an  
5 incorrect statement of the law. That principle does not appear  
6 in the *Flamingo* case, the governing --

7 THE COURT: Can I stop you right there?

8 MR. ABELES: Sure.

9 THE COURT: Okay, you spent ninety percent of your  
10 brief urging me to reconsider. I'm not going to reconsider,  
11 okay? I struggled through the case law. I understand it's a  
12 jump-ball question. The case law points in different directions.  
13 The brief is a bit overwrought on the point of -- if you don't  
14 mind my adjective -- I get it that you don't agree with me.  
15 And I also have said I think it's a close call. I'm trying to  
16 understand whether it meets the standard for an interlocutory  
17 appeal.

18 MR. ABELES: So let's start there, your Honor. So  
19 under Section 1292(b), which is the governing section for  
20 certifying an interlocutory appeal, there are three factors, as  
21 your Honor knows. As Professor Wright points out in his  
22 treatise, we should think of those factors as guiding criteria,  
23 not jurisdictional prerequisites. They're meant to inject  
24 flexibility into the inquiry so that if the Court determines  
25 that the gains of an interlocutory appeal are likely to

1 outweigh the costs or the losses, the District Court should  
2 certify the issue and let the First Circuit decide whether it  
3 wants to review the issue or not.

4 The first factor is whether a controlling question is  
5 presented. The Red Cross suggests a very cramped standard  
6 under which, unless the question will terminate or dramatically  
7 or drastically narrow the case, it's not a controlling question.  
8 That is not consistent with the First Circuit's case law, the  
9 *San Juan* case, the *McGillicuddy* case. What they say,  
10 consistent with Professor Wright's flexible approach, is that a  
11 difficult question, a serious question, a pivotal question is a  
12 controlling question. It does not need to terminate or  
13 drastically --

14 UNIDENTIFIED SPEAKER: I'm going to use the restroom,  
15 okay?

16 THE COURT: Somebody who just left, we could hear her,  
17 so maybe people should turn off their mics.

18 THE CLERK: Yes, Judge, I'm trying to figure out who  
19 that is. Olivia Gibbs, let me mute her.

20 THE COURT: Okay, thank you. Okay, I know it was an  
21 accident. All right, go ahead. So we were at that I shouldn't  
22 view it as a standard that it has to narrow a case?

23 MR. ABELES: That's correct, and we provided several  
24 examples of First Circuit case law. *San Juan* was about a work  
25 product issue. Resolution wouldn't end or narrow that case.

1 The *Lupron* case from this court from D Mass. was about the  
2 attorney-client privilege, and, of course, that can't narrow or  
3 reduce a case. In fact, anytime a plaintiff is seeking  
4 interlocutory review, it's unlikely that -- so the plaintiff  
5 has probably lost something important and is seeking review so  
6 that that claim can be restored. It's going to expand the case  
7 somewhat, but it can still be a controlling question, and  
8 that's what we see in the First Circuit's *Lane* case. That was  
9 a case that the First Circuit certified an appeal of a plaintiff  
10 that had lost on Eleventh Amendment immunity grounds, brought a  
11 copyright claim against the Commonwealth of Massachusetts. That  
12 was certified for interlocutory appeal. We cited a case out of  
13 the Third Circuit, the *Santana Products* case. That was a case  
14 in which the plaintiff lost a *Noerr-Pennington* immunity claim.  
15 Nonetheless, the Third Circuit thought that was important,  
16 serious, and so forth, certified that for appeal. The sister  
17 court down in the District of Puerto Rico --

18 THE COURT: So are there any cases -- this is unusual  
19 because there was a big claim, the antitrust claim which  
20 created a novel issue of law and how that should be treated  
21 with respect to Red Cross; but there's another major claim,  
22 which is a 93A claim, where you essentially have two big  
23 claims, one of which was lost and one of which I declined to  
24 dismiss, so --

25 MR. ABELES: Right, that's true, your Honor. So in

1 all of these cases that we're talking about, *Lane, Santana,*  
2 *Rivera*, the reason it's interlocutory is, there are remaining  
3 claims down in District Court.

4 THE COURT: Right, the point of defendant was that  
5 it's rare to just grant an interlocutory under just a failure  
6 to win, you know, on a motion to dismiss where some claims are  
7 upheld and some denied; and you would say the difference is,  
8 this is akin to an immunity claim?

9 MR. ABELES: Yes. So an immunity claim, the question  
10 is whether the defendant belongs in Federal Court, is amenable  
11 to that suit. Here, the personhood claim, the question is  
12 whether the defendant belongs in Federal Court and is amenable  
13 to the suit. So it's a different way of getting at the same  
14 result. The standard is similar. That's about whether the  
15 plaintiff belongs in court, and those are quintessential  
16 controlling questions under the case law.

17 THE COURT: Well, would you agree, though, if I got  
18 reversed, let's say, and they said, "Well, no, you can consider  
19 it," but I granted the motion to dismiss on other grounds like,  
20 I don't know, failure to plead sufficient control of the  
21 marketplace or some such, that would not be appealable, right?

22 MR. ABELES: So --

23 THE COURT: In other words, what the First Circuit is  
24 worried about is piecemeal appeals.

25 MR. ABELES: Sure, I understand that, your Honor. So

1 they did make a point that there are other defenses that they  
2 raised that your Honor did not --

3 THE COURT: I didn't even get to.

4 MR. ABELES: Right, exactly. So those claims, your  
5 Honor, are under tried-and-true, exclusive dealing and tying  
6 law. They're very, very fact-laden. Their main defense was  
7 that the Red Cross does not compete with Verax. That is not a  
8 novel question. That comes up all the time.

9 THE COURT: So if I grant their motion to dismiss --  
10 let's say you win this, and the First Circuit decides, based on  
11 *Flamingo* or whatever, that, yes, despite the statutory language,  
12 it's a person for purposes of Sherman Act, okay, then it comes  
13 back down. What the defense's point of view was, "Well, we  
14 still have an outstanding motion to dismiss." You know, "Are  
15 you going to grant an interlocutory appeal if you grant that?"

16 MR. ABELES: And my answer is, that one is just --  
17 even under what the Red Cross -- even under their analysis of  
18 the case law, that claim is not susceptible to interlocutory --

19 THE COURT: You're not hearing my law school professor  
20 question. Let's assume for a minute I agree with them -- I  
21 haven't even looked at those, so I'm not foreshadowing  
22 anything -- but what the First Circuit would be upset about  
23 would be, okay, you get to come back now, and then I grant the  
24 motion to dismiss on, let's say, lack of market share, whatever  
25 it is, then you would seek to appeal again.



1 MR. ABELES: So I think by definition, the hypothetical  
2 that you created, your Honor, would create two different appeals.  
3 I mean, you know, that's the logic of --

4 THE COURT: You would take another interlocutory  
5 appeal basically.

6 MR. ABELES: So --

7 THE COURT: That's what they always say: We don't  
8 want piecemeal, like, little pieces at a time appealed.

9 MR. ABELES: Yes, and I understand that. So, one,  
10 that kind of claim, a standard fair tying claim is just not a  
11 novel claim, it's not unsettled. It's so fact -- it's not an  
12 issue of law. It's going to be an issue of whether we pled the  
13 right facts. It is not susceptible to an interlocutory appeal.  
14 One could not make a good-faith argument.

15 THE COURT: Okay, I just wanted to make sure. I mean,  
16 that's the kind of comfort, if you will, the First Circuit  
17 would have wanted.

18 MR. ABELES: Yes, but I want to make clear as well,  
19 your Honor, that if you rule one way and they take it up and  
20 you rule a different way when it comes back down, sure, by  
21 definition, that would create, you know, two separate appeals.  
22 It's just not -- there's no threat of that here because of the  
23 nature of the arguments, whether or not we compete with them.  
24 That's just a fact argument for the District Court to deal with  
25 as opposed to --

1 THE COURT: Well, I myself doubt there would be an  
2 interlocutory appeal on the second, if you will, if it came  
3 back to that, because I would still have the 93A claim. What's  
4 going on with the 93A claim?

5 MR. ABELES: So discovery has started according to the  
6 Court's schedule and orders. We served document requests and  
7 other discovery upon the Red Cross, and it's provided its  
8 initial responses, and we need to meet and confer. So it's  
9 still relatively early in this case.

10 THE COURT: So one concern that I have, and I'll ask  
11 the defense this, is whether I should just stay all discovery  
12 pending a resolution of the First Circuit because you might  
13 have to redo it all.

14 MR. ABELES: So I understand that concern, your Honor,  
15 and what we would say, I think -- and we understand, we don't  
16 want duplicative work and so forth. I don't see a good reason  
17 to -- we are at the point of document discovery. I think they  
18 should continue to collect, review, and produce documents of  
19 the claims that are here. I don't see why not. But I  
20 understand your Honor's perspective, and, you know, if you do  
21 certify it for appeal and you want to stay discovery at the  
22 same time, I would understand that --

23 THE COURT: Okay, I just was curious what your response  
24 would be and how far along you are. I take it you're not close  
25 to settling the 93A. 93A is a bit different than the antitrust.

1 It's like a defamation of the company or whatever; it's "false  
2 statements about the product" kind of case.

3 MR. ABELES: Yeah. We did mediate. We were not able  
4 to reach -- with Judge Sleet, we had a mediation session that  
5 did not prove --

6 THE COURT: Judge who?

7 MR. ABELES: Judge Sleet. He was a federal judge in  
8 Delaware.

9 THE COURT: Okay, nice.

10 Okay, let me move to the defense here a bit. So I  
11 made no secret about that I thought you could argue this both  
12 ways. It's a law school exam question kind of thing. Why  
13 wouldn't it make sense just to let them rule on it, and then we  
14 can redefine the scope of discovery, if in fact it comes back  
15 down?

16 MS. GIORDANO: Well, let me start where the Court  
17 started, which is the elements of 1292(b). And starting first  
18 with controlling question, which, as this Court mentioned in  
19 the *Henderson* case in 2016, and how the courts have treated it,  
20 it's closely intertwined with the third element, which is  
21 "materially advances for termination of the litigation." And I  
22 think the Court has hit on for these two elements the key  
23 issue, which is, right now we have a complaint with six counts  
24 in it. We have a situation where the Court has dismissed four  
25 of those counts and two are going forward. And we had asked

1 Verax if they would agree to stay the two remaining counts, and  
2 they said, no, they won't, but the reason they told us they  
3 won't --

4 THE COURT: But that's not what he just said, so --

5 MS. GIORDANO: Well, if he changed his mind, that's  
6 great, but I still think this part is important, which is, the  
7 reason he said that they would not stay those counts, what they  
8 said to us -- and I looked in their brief to see if they said  
9 anything about this and they didn't, and this is what's  
10 important -- what they said is, it doesn't matter to them what  
11 happens on appeal for purposes of those two remaining claims.  
12 The outcome of that appeal is not going to affect what they do  
13 with respect to those two remaining claims. They want them to  
14 go forward however far they can take them --

15 THE COURT: Can I just say, in terms of advancing the  
16 termination of the litigation, as I understand it, it's  
17 primarily a 93A claim, which is decided by me, not a jury, and  
18 it's pretty much -- I forget the exact words that were used,  
19 but saying false things about their product to the marketplace.

20 MS. GIORDANO: Uh-huh, uh-huh.

21 THE COURT: The scope of discovery would be  
22 dramatically less than a full-blown antitrust suit.

23 MS. GIORDANO: I certainly agree with that, your  
24 Honor, and, frankly, that's what I expected them to say, both  
25 in their brief and when I asked them that question, but it

1 doesn't appear anywhere in their brief. And that's why I think  
2 when they cite to you that case from the District of Puerto  
3 Rico, the *Rivera-Nazario* case, well, that's a very different  
4 circumstance. There the court expressly found that the Sherman  
5 Act Claims were the crux of the case, and so to resolve those  
6 claims on appeal, the other little state law claims, they  
7 weren't really worth very much; they were small and not  
8 valuable to the plaintiffs. The plaintiffs agreed with that,  
9 and they were going to resolve themselves depending on how the  
10 Sherman Act claims got resolved on appeal.

11 I would have thought that their expert would say  
12 something like that to you here or to us at some point, and  
13 it's the opposite. They said they're going forward with their  
14 two state law -- their 93A claim and their tortious interference  
15 claim sort of regardless of what happens on appeal; and we have  
16 not found any First Circuit authority for an interlocutory  
17 appeal in these circumstances where one issue on just three  
18 claims goes up and two other claims move forward. The *Lane*  
19 case that Mr. Abeles mentioned for the First Circuit was a very  
20 different circumstance. There the claims that went up on  
21 appeal resolved all claims between the parties that were going  
22 up on appeal. There was nothing remaining in the District  
23 Court between those parties. There were some other claims  
24 between other parties and the plaintiff that remained, but  
25 between the parties going up on appeal, everything had gotten

1 resolved, so it made sense to go up.

2 THE COURT: So this wouldn't terminate the case. If  
3 anything, it would expand the case if Verax wins. On the other  
4 hand, you'd have to redo the discovery.

5 MS. GIORDANO: Correct.

6 THE COURT: That's the thing that's messy here. I  
7 don't want either a nonprofit like American Red Cross spinning  
8 its wheels to do a document production that then has to redo  
9 new search terms, nor do I want Verax, who's apparently  
10 struggling, to have to take depositions and spend money on  
11 discovery. It does feel like the 93A claim -- I don't know if  
12 they'd concede this -- is the tail wagging the dog. You know,  
13 it is the more minor state case compared to what you can get in  
14 a national antitrust claim. I think the negative is, of  
15 course, it will take, you know, if the First Circuit decides to  
16 take it, it will probably take a year chunk out of the -- it  
17 will take, you know, a year. I've had it go up before and it  
18 takes a year out, but it would be a dramatically different  
19 case.

20 MS. GIORDANO: I think I agree with all that, your  
21 Honor, and what I would say is, I think this is why we don't  
22 see any authority in the First Circuit to accept an appeal in  
23 those circumstances where claims go on in the District Court,  
24 right? It's hard to see how you can satisfy the "materially  
25 advances termination of litigation" prong when, you know, with

1 everything you just described.

2 THE COURT: What I was just thinking of is, I would  
3 just stay the 93A case, was the approach that I would take  
4 because it obviously means a lot to the plaintiff. You can  
5 tell from the brief they care a lot about it. But I don't want  
6 to make the American Red Cross or Verax redo all the document  
7 discovery -- that seems crazy -- or redo the 30(b)(6), or redo  
8 it all. And I think I'm just inclined -- it's such a big issue  
9 and it's so unresolved --

10 MR. ABELES: Your Honor, if I could, so as plaintiffs,  
11 of course, with live claims before the Court, of course our  
12 attitude, I think we're obligated to say, "No. Let's go  
13 forward. We want to prosecute these claims." But we can just  
14 resolve this part of the argument if your Honor would certify  
15 the issue for appeal. You can just issue a stay yourself, but  
16 we would not contest that. And so, you know, we can just  
17 eliminate this, just see which way the wind is blowing, and I  
18 understand your logic. So that would be our position.

19 THE COURT: Yes, I'm leaning that way, as is very  
20 obvious from this oral argument. And I have read your briefs,  
21 which are, as usual, outstanding on both sides. I'm inclined  
22 to let the First Circuit have its say on it. If it is an  
23 antitrust case, it's huge, and maybe it would be an impetus to  
24 settlement. If it's not one, I can do it in pretty short order.  
25 It's not that -- the 93A is not -- we wouldn't even have to do

1 summary judgment. I mean, we could just do what, a one-week  
2 bench trial on it? I mean, I could probably get to it fairly  
3 right away. How much more discovery would you say you'd need  
4 on the 93A, like six months?

5 MS. GIORDANO: We haven't started discovery in a  
6 meaningful way yet, your Honor, so I think that's something we  
7 could confer with the plaintiffs about and come to resolution  
8 on that.

9 THE COURT: All right. Well, it may take me, I don't  
10 know, two to three weeks. You have to write an opinion in the  
11 First Circuit. You can't just say "I certify" or "I don't  
12 certify." Let's put it that way. I have to do something.

13 So why don't I do this: Why don't I at this point  
14 stay discovery. I'm inclined to certify for appeal, but I  
15 don't want people to spin their wheels on something that's  
16 going to be a very different case if reversed; and if it's not  
17 reversed and they agree with me, then I don't think it would  
18 take more than three to six months to clean it up and get to  
19 a -- you know, finish up discovery and get to trial because  
20 it's a bench trial.

21 And I take it, from the defense point of view,  
22 settlement is a nonstarter?

23 MS. GIORDANO: I think we -- I would never say that we  
24 don't want to continue discussions. I think that the door is  
25 always open. I don't think that we had a resolution in the



1 first session with Judge Sleet.

2 THE COURT: Or if the FDA -- I know part of it was  
3 some ambiguity in the regulations as to how to construe it.  
4 Have they clarified it all in opinion letters or that sort of  
5 thing?

6 MS. GIORDANO: I don't believe that from the Red Cross  
7 perspective we feel that there is any ambiguity that they need  
8 to clarify. I don't know if Mr. Abeles feels otherwise.

9 THE COURT: I thought you did. I thought someone, not  
10 you but that Verax did. No?

11 MR. ABELES: I don't think so, your Honor. I think  
12 the guidelines provide three solutions --

13 THE COURT: Yes.

14 MR. ABELES: -- on which is best, and I think both  
15 sides agree that those are the products or solutions at issue.

16 THE COURT: Maybe that was something early on you said  
17 and I'm misremembering, that there was some wiggle room there.  
18 But, in any event, I will take this under advisement, and I  
19 now -- yes?

20 MS. GIORDANO: May I register one 30 last seconds?

21 THE COURT: Yes.

22 MS. GIORDANO: I just didn't want my position to be  
23 misconstrued or there to be any surprise when Verax petitions  
24 to the First Circuit. We obviously, as you know from our  
25 brief, don't believe that the substantial ground for difference

1 of opinion prong is met. I just didn't want there to be -- I'm  
2 sure the Court understands --

3 THE COURT: You both were very strong in your positions,  
4 both before me and again on this. I'm not reconsidering. I  
5 still think it's the better argument that you've made, it's the  
6 better of the two, but there are only, like, three or four  
7 cases on it. There's a brand-new -- not brand-new, but there's  
8 a statute that's unique to the American Red Cross. This is  
9 what I found persuasive. Verax didn't agree with that because  
10 they think *Flamingo* should be read differently. And I just  
11 think it's of the genre that the First Circuit should rule on  
12 before we embark on massive discovery.

13 And, honestly, I have enough to do that I don't want  
14 to do a trial on a 93A and then have to come back and then do a  
15 whole new trial. I don't think that's in anybody's interest.  
16 And there's a really good chance that we would reach the 93A  
17 point before we got an answer from the First Circuit, you know?  
18 Basically it often takes a year if they take it. If they don't  
19 take it, it's quicker, sort of watching it from afar. I don't  
20 know what you've seen, but -- okay? So, thank you. And have a  
21 wonderful July 4.

22 MS. GIORDANO: Thank you.

23 MR. ABELES: Thank you. You too, your Honor.

24 THE COURT: Thank you. Bye-bye.

25 (Adjourned, 9:52 a.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT )  
DISTRICT OF MASSACHUSETTS ) ss.  
CITY OF BOSTON )

I, Lee A. Marzilli, Official Federal Court Reporter,  
do hereby certify that the foregoing transcript, Pages 1  
through 18 inclusive, was recorded by me stenographically at  
the time and place aforesaid in CA No. 23-10335-PBS, Verax  
Biomedical Inc. v. American National Red Cross, and thereafter  
by me reduced to typewriting and is a true and accurate record  
of the proceedings.

Dated this 9th day of July, 2024.

/s/ Lee A. Marzilli

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LEE A. MARZILLI, CRR  
OFFICIAL COURT REPORTER